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IN THE

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Supreme Court of the United States

October Term, 1968

No. [redacted] 181

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1519

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

I.

The Statute Involved and the Nature of the Case.

A. The Statute.

This appeal raises the question of the validity of the provisions of California's mandatory minimum retail price maintenance system for alcoholic beverages sold at retail in California. The principal statute and ad-

ministrative regulation concerned herein is section 24755 of the California Alcoholic Beverage Control Act (California Bus. & Prof. Code, Division 9) and section 99 of Title 4 of the California Administrative Code. Said provisions of law are attached to appellant's jurisdictional statement as Appendices "B" and "C".

B. The Proceedings Below.

Appellant's license to sell alcoholic beverages in the State of California was revoked for retail sales of liquor below the filed and published minimum retail price schedules on file with the Department of Alcoholic Beverage Control.

The Department's decision was appealed to the Alcoholic Beverage Control Appeals Board (California Bus. & Prof. Code §§ 23080-23087). By written opinion, the Appeals Board affirmed the decision of the Department. (Appellant's jurisdictional statement, Appendix A.)

Appellant's petition for writ of review to the California Court of Appeal, Second Appellate District, was denied without written opinion on April 24, 1968. Appellant's petition for hearing, writ of review, and stay order in the Supreme Court of the State of California was denied without opinion on May 22, 1968.

II.

The Case Presents No Substantial Question Not Previously Decided by This Court.

Appellant contends that section 24755 of the California Business and Professions Code violates federal anti-trust statutes.

The Sherman Act (15 U.S.C. §1) declared illegal contracts, combinations, or a conspiracy in restraint of trade. Where retail prices or marketing programs derive their authority and efficacy from the legislative command of the state, the Sherman Act is inapplicable. *Parker v. Brown,* 317 U.S. 341, 350 (1943).

The California Alcoholic Beverage Control laws do not require or sanction price fixing conspiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

The declared purpose of the McGuire Act (15 U.S.C. 45) in 1952 was to:

> ". . . protect the rights of the States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. . . ." (66 Stat. 631).

The McGuire Act expressly validates the nonsigner clause and thus, in effect, reversed the decision of this Honorable Court in *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951).

In reviewing changes in the New York Alcoholic Beverage Control law, this Honorable Court noted in *Seagram v. Hostetter,* 384 U.S. 35, at p. 45 (1966):

> "The appellants' contention that §9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between §9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1-7 (1964 ed.) and §9 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
>
> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decision * * enjoin(s) seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" (Emphasis added)

Appellant's contention that the statutes and rules creating California's retail price maintenance system for liquor sold in California constitutes a denial of due process and equal protection of the law, presents no substantial federal question.

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and

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[1]*Mugler v. Kansas,* 123 U.S. 623, 657-671 (1887); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890).

[2]*State Board of Equalization v. Young's Market,* 299 U.S. 58, 63-64 (1936); *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938); *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939); *Ziffrin v. Reeves,* 308 U.S. 132, 138 (1939); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945).

control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce,[3] (b) import-export[4], (c) interstate commerce in transit through the regulating state[5], (d) federal enclaves[6], and (e) possible intolerable burdens on interstate commerce *outside* of the regulating state[7], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

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[3]U.S. Const. Art. I, § 8, cl. 3; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U.S. 124 (1964).

[4]U.S. Const. Art. I § 10, cl. 2; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Low v. Austin*, 13 Wall. 29 (1871); and see *Parrott & Co. v. San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881 (1955).

[5]*Duckworth v. Arkansas*, 314 U.S. 390 (1941); *Carter v. Virginia*, 321 U.S. 131 (1944); *Gordon v. Texas*, 355 U.S. 369 (1958).

[6]*Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

[7]*Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Cf. *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945).

[8]*Schwartz v. Kelly*, 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; *California v. Washington*, 358 U.S. 64 (1958), motion to file complaint denied; *Hooper v. Duncan*, 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; *Plaza Liquor Stores, Inc. v. City of Atlanta*, 381 U.S. 914 (1965), cert. denied; *Laird & Co. v. Cheney*, 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; *Inman v. City of Miami*, 389 U.S. 1048 (1968), cert. denied.

As but recently set forth by this Honorable Court in *Seagram v. Hostetter,* 384 U.S. 35 at 41-43 (1966):

". . . The appellants attack §9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations)

". . . the present case concerns liquor destined for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave

an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. (Citation) No such situation is presented in this case. The mere fact that §9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." (footnote omitted.)

In *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington,* 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Commission, supra; Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395; *Mahoney v. Joseph Triner Corp., supra;* and *State Board of Equalization v. Young's Market,* 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.,* 299 U.S. 59, 63-64 (1936):

". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights[9] and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourtenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[10]

The California courts have consistently held that the retail price maintenance provisions of the Alcoholic Beverage Control Act are a valid exercise of the police power.

Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737 (1959);

Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735 (1966);

Reimel v. Alcoholic Beverage Control Appeals Board, 256 A.C.A. 188; 64 Cal. Rptr. 26, 33 (1967).

Conclusion.

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

Dated: July 10, 1968.

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[9]*Crowley v. Christensen,* 137 U.S. 86, 91 (1890); *Crane v. Campbell,* 245 U.S. 304, 308 (1917).

[10]U.S. Const. 21st Amendment; *California v. Washington,* 358 U.S. 64 (1958), and the authorities cited in footnotes 1 and 2, *supra.*